

Hitting where it hurts the most: Hungary's legal challenge against the EU's refugee quota system

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Following the drama and confusion on the South-Eastern borders of the EU in the hot summer of 2015, the EU and the Member States within seemed to have found solutions for the management of the crisis that was caused by the influx of refugees and migrants entering Europe. One of the instruments adopted was a Council Decision which introduced a quota system for the distribution and settlement of asylum seekers and migrants among the Member States. Its aim was to relieve the burdens from the most affected Member States and to establish a regime for the fair sharing of burdens among the Member States. This quota system was opposed and subsequently challenged before the EU Court of Justice by Hungary, which was one of the worst affected EU Member States, by which it affirmed its position as a Member State which regards the Union primarily as an arena for vindicating its national interests, and which is not hesitant to prioritise its own interests, mainly in areas which fall within competences retained by the Member States, over those of other Member States and of the Union.

The legal challenge mounted by Hungary against the Council Decision, although its outcome is far from certain and on the basis of the documents available it is difficult to assess whether the legal grounds listed actually justify Hungary's optimism regarding its action, demands attention for a number of reasons. Firstly, the Hungarian government has claimed that the action based on the principle of subsidiarity will break new ground in the defence of Member State sovereignty and interests. Although this in itself is an acceptable cause pursued by a Member State in this current period of national obsession with repatriating powers and with redesigning the EU as the union of sovereign nation states, for the EU Court to address the matter of subsidiarity Hungary first has to make out a case for a much more technical legal issue, namely that the Council Decision is a legislative measure which should have been adopted following a different procedure and under a different legal basis. Secondly, the case represents a curious intertwining of domestic and European politics with which Hungary had the explicit aim of emphasising that its opposition to EU policy rests on a broad democratic legitimisation granted by a national parliament. With the strategic use of the domestic political arena, Hungary wanted to show that it is aware of the weak spots of the EU decision-making process – its democratic deficit, and it wanted to demonstrate that for this reason, in its view, in matters as serious as mass migration power and action must remain with the nation State. Thirdly, the challenge by Hungary and its broader political and policy context serve as a stark reminder that despite decades of European integration, and European constitutionalism which came with it, within their national territories, especially at the border of those territories, national governments hold, and can wield, the sovereign power, and that they are indeed able to create circumstances which contradict and damage the interests of the Union.

The cause of the conflict entering into the legal domain is twofold. On the one hand, the Justice and Home Affairs Council meeting on 22 September adopted a [Decision](#) about the distribution of 120.000 persons in clear need of international protection among the 26 Member States of the EU in order to release the pressure from the most affected Greece and Italy. This openly contradicted the Hungarian government's hard-line stance on addressing the migration and refugee crisis which culminated over the summer of 2015 in its quasi withdrawal from the Common European Asylum System (CEAS) after successfully erecting an 'iron curtain' on its Southern borders and establishing in parallel a legal iron curtain by modifying controversially the applicable criminal and administrative laws. On the other, since January 2015, in order to regain popular support and throw back the political challenge from the far-right, the Hungarian government – presumably with full knowledge of what was to happen later that year – had been consciously building a political campaign on the matters of migration and terrorism under the broad rhetorical theme of national self-defence. The success of that campaign in the domestic political arena, and the parallel rise of the 'Hungarian solution' in the European political agenda championed by the prime minister, made it impossible for the Hungarian government to retreat and accept a

common European solution which would contradict its claims about the success of Member State unilateralism in addressing the migration and refugee crisis.

The legal challenge, which was to express the political disapproval of the Hungarian government with the quota system for it being irrational and dangerous, was prepared in Hungary with two aims (a national and a European) in mind. First, it wanted to demonstrate in the national political arena that the government is resolved to maintain its hard-line migration and refugee policy, and second, the government wanted to act in the European political and legal arena with full democratic authorisation coming from the national parliament. On 6 November, following a [motion from the governing party](#), which had condemned the Council Decision in an earlier political statement as having been adopted in a legally inappropriate decision-making process and without the involvement of national parliaments, the Hungarian Parliament accepted a resolution (55/2015) which considered the Council Decision to be illegal and in breach of the principle of subsidiarity. This was followed on 17 November by the enactment of Act 2015:CLXXV on acting against the compulsory settlement quota system in defence of Hungary and Europe calling on the Hungarian government to initiate an action for annulment under Article 263 TFEU against the Council Decision primarily for the breach of the principle of subsidiarity. The Act also contended summarily that the EU's quota system would increase crime, spread terrorism and endanger Hungary's cultural values. The minister for justice speaking to the government press [argued](#) in support of the Act that although the Member States had agreed to give up their sovereign powers to a certain extent in return for EU membership, they still kept some crucial powers to themselves, such as regulating who they allow to enter their territory and who they want to keep out.

The action for annulment envisaged by the Hungarian parliament was filed on 3 December 2016 (Hungary v Council Case C-647/15, OJ (2015) C38 43) requesting the annulment of the contested Council Decision, or as an alternative its annulment so far as it concerns Hungary. (On 3 December, Slovakia also filed an action for annulment against the Decision to the EU Court, ([Slovakia v Council](#) Case C-643/15), OJ (2015) C38 41.) The action by Hungary is not particularly economic in its legal challenges: it lists nearly every potential legal ground that could lead to the invalidity of the quota system. Otherwise, it seems to lack the drama which was used so expertly at the national level in the political preparation of the legal challenge. At its core, the action contends that the Decision lacks a legal basis and is vitiated by procedural irregularity. It claims that Article 78(3) TFEU does not provide the Council with an adequate legal basis for the adoption of the contested decision and that Article 293(1) TFEU was violated when the Council departed from the Commission's proposal without acting under unanimity. It also adds that after consulting the European Parliament, the Council substantially amended the text of the proposal, on which it failed consult the European Parliament again. The action also mentions that at the time of approval by the Council the draft decision was not available in the official languages of the Union.

As substantive legal hiatuses, the action states that the Decision was adopted in contravention with Article 68 TFEU and with the conclusions reached by the European Council at its meeting on 25 and 26 June 2015, it violates the principles of legal certainty and legal clarity for failing to explain various aspects of its application and its relation with other applicable EU measures, it breaches the principles of necessity and proportionality by aiming to achieve outcomes which are excessive and which have no connection with the problem to be addressed as set out in the Commission proposal, and finally the Decision violates the principle of proportionality in respect of Hungary as it does not appreciate the burdens faced by Hungary as a Member State affected disproportionately by the migration and refugee crisis and instead of alleviating its burdens, as it should follow from the purpose determined in Article 78(3) TFEU, it imposes further obligations on it.

The claim that the Decision violates international law, namely the Geneva Convention relating to the Status of Refugees, by depriving applicants of their right to remain in the territory of the Member State in which they made their application and by allowing their relocation to another Member State, which argument also forms part of the [motion](#) submitted by the Ombudsman in Hungary to the Hungarian Constitutional Court concerning the lawfulness of the Council Decision, was hidden within the claim on legal certainty and clarity.

The ground relating to the violation of subsidiarity, which was [supposed](#) to be at the heart of this action if we believe the claims by Hungary that with its legal challenge it wants to set a precedent in the Union for the legal protection of Member State sovereignty, is raised halfway within the action's long list of challenges. In this regard, Hungary claims that because the contested Decision is a genuine legislative act the Council – before its

adoption – should have given an opportunity for national parliaments to exercise their rights to issue an opinion. The basis of this obligation was found by Hungary in Protocols 1 and 2 of the Treaties. The success of this claim depends primarily on whether Hungary is able to establish that the Decision is of legislative nature, which argument is also central to the claim that Article 78(3) TFEU was an inappropriate legal basis for its adoption.

The legal challenge mounted by Hungary against the Council Decision hits the European Union where it hurts the most. Firstly, it constitutes an open rejection of months of European efforts to develop collective responses to a crisis, which because of its scale and impact should require a collective response. It also expresses a clear intention by a Member State not to take part in bearing the burden of the common policy responses created to address a European crisis, which Member State as a result of its unilateral action managed to shift the majority of the burdens of dealing with the crisis onto its neighbouring States, which with the exception of Serbia are EU Member States. Secondly, the domestic political preparation of the challenge was staged with the clear purpose of confronting the European Union with the democratic legitimacy of Hungary's actions and the painful democratic hiatus of EU policy making. While pleasing the domestic electorate was also on the agenda, the adoption of the parliamentary resolution and the act calling for the government to act before the EU Court of Justice was a calculated step towards making out the case to establish that fatal legal deficit of the contested Council Decision of violating the rights of national parliaments and the principle of subsidiarity. This was not the first occasion when the Hungarian parliament is used by the government to conjure a broader democratic justification of its European politics. There is a steady flow of resolutions from the parliament calling for the government to protect Hungary from European and international criticisms and other challenges.^[1] These most recent measures adopted by parliament, however, stand out as it is the first instance when this curious (others would say cynical) game of Hungarian democratic politics is taken out to the European political arena as a symbolic act of defiance to the EU's political and constitutional structure.

Disclaimer: This blog entry does not represent the official opinion of the Hungarian Academy of Sciences, Centre for Social Sciences.

^[1] E.g., Resolution 11/2012 expressing gratitude towards Polish politicians and members of the Polish civil society for defending Hungary against international criticisms, Resolution 12/2012 expressing gratitude towards Lithuanian politicians and members of the Lithuanian civil society for defending Hungary against international criticisms, Resolution 34/2013 condemning Commissioner Viviane Reding for her politically motivated opinion and actions in connection with a criminal case involving Hungarian authorities, Resolution 69/2013 demanding equal treatment in the European Union for Hungary as a Member State (reacting to the 3 July 2013 resolution of the European Parliament on the Tavares-report), Resolution 36/2015 calling for the leaders of the European Union to act responsibly in resolving the migration crisis.

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